JATI ERAT SDN BHD

v.

CITY LAND SDN BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[ORIGINATING SUMMONS NO: 24-671-2000]
28 NOVEMBER 2001

ARBITRATION: *Agreement - Jurisdiction of court - Arbitration proceedings held before the Regional Centre for Arbitration at Kuala Lumpur - Whether court has jurisdiction to grant Mareva injunction - Rules of the Regional Centre for Arbitration at Kuala Lumpur, art. 26(3) - Arbitration Act 1952, s. 34(1)*

CIVIL PROCEDURE: *Injunction - Mareva injunction - Principles applicable - Whether there was an arguable case - Whether there was serious risk of dissipation of defendant's assets*

This was the plaintiff's application by way of originating summons for a Mareva injunction to restrain the defendant from dissipating certain assets, until one month after the current arbitration proceedings between the plaintiff and defendant before the Kuala Lumpur Regional Centre for Arbitration ('KLRCA'), were resolved. The plaintiff contended that although the aforesaid arbitration proceedings were governed by the Kuala Lumpur Regional Centre for Arbitration Rules ('KLRCA Rules'), the High Court had jurisdiction to grant the Mareva injunction by virtue of art. 26(3) of the KLRCA Rules. It also submitted there was a real risk of dissipation of the defendant's assets, which had been charged for a loan to a third party, as the defendant had failed to produce documentation proving that the charge was properly done. The defendant however argued that there was no jurisdictional basis for the plaintiff's application and that the plaintiff had failed to demonstrate its entitlement to a Mareva injunction.

Held:

[1] Article 26(3) of the KLRCA Rules does not confer any jurisdiction on the High Court, nor can it be construed to supersede the clear and precise provisions of s. 34(1) of the Arbitration Act 1952 ('AA 1952') which excludes the AA 1952 and all other written law from arbitrations held under the KLRCA Rules. Article 26(3) is part and parcel of the KLRCA Rules and does not form part of the law; it is only of restricted application *ie,* in arbitration proceedings before the KLRCA and nowhere else. The aforesaid arbitration proceedings came within the ambit of

s. 34(1) of the AA 1952, and all written law could have no application. Therefore, the plaintiff's application was devoid of any jurisdictional basis. (p 356 a-c)

[2] On the assumption that the High Court has jurisdiction under art. 26(3) of the KLRCA Rules, in order for a Mareva injunction to be granted, the plaintiff has to establish that: (i) there was a strong *prima facie* case against the defendant; (ii) the defendant has assets within jurisdiction; and (iii) there was a danger that the defendant's assets may be dissipated before judgment. (pp 356 e-i & 357 a-c)

[2a] The issue as whether or not the plaintiff had a strong *prima facie* case had to be determined by the respective arbitrators in the aforesaid arbitration proceedings. In this connection, there was no evidence pertaining to the finding by the respective arbitrators in respect of this essential element *ie*, a strong *prima facie* case. (p 358 c & e)

[2b] The two pieces of land in question belonging to the defendant ('the assets') were within jurisdiction. However, on the facts, there was no evidence of any conduct on the part of the defendant that suggested that there was a risk of the assets being dissipated and as a matter of fact, the assets had been locked and interlocked by way of charges as security for the aforesaid loan. (pp 358 f, h-i & 359 b)

[Application dismissed.]

Case(s) referred to:

Ace King Pte Ltd v. Circus Americano Ltd [1985] 2 MLJ 75 ***(refd***

Arab Malaysian Corp Builders Sdn Bhd & Anor v. ASM Development Sdn Bhd [1998] 2 CLJ Supp 169 ***(refd)***

Aspatra Sdn Bhd & Ors v. Bank Bumiputra Malaysia Bhd & Anor [1987] 2 CLJ 377; [1987] CLJ (Rep) 50 ***(refd)***

Bank Bumiputra Malaysia Bhd v. Lorrain Osman [1985] 2 MLJ 236 ***(refd)***

Choy Chee Keen Collin v. Public Utilities Board [1997] 1 SLR 604 ***(foll)***

Creative Furnishing Sdn Bhd v. Wong Koi [1989] 2 CLJ 93; [1989] 1 CLJ (Rep) 22 ***(foll)***

Klockner Industries-Anlagen GmbH v. Kien Tat Sdn Bhd & Anor [1990] 3 MLJ 183 ***(foll)***

Mareva Compania Naviera SA v. International Bulkcarriers SA [1975] 2 Lloyds Rep 509 ***(refd)***

Nipoon Yusen Kaisha v. Karageorgis [1975] 1 WLR 1093 ***(refd)***

Pacific Centre Sdn Bhd v. United Engineers Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 ***(foll)***

Rasu Maritima SA v. Perusahaan Pertimbangan Minyak Dan Gas Bumi Negara (Government of the Republic of Indonesia Intervening) [1978] QB 644 ***(refd)***

Regent Decorators (M) Sdn Bhd & Anor v. Michael Chee & Ors [1984] 2 CLJ 296; [1984] 2 CLJ (Rep) 441 ***(refd)***

Rimbunan Hijau Sdn Bhd v. Sarawak Plywood (M) Sdn Bhd [1985] 1 CLJ 424; [1985] CLJ (Rep) 275 ***(refd)***

S & F International Ltd v. Trans-Con Engineering Sdn Bhd [1985] 2 CLJ 228; [1985] CLJ (Rep) 280 ***(refd)***

Sarawak Shell Bhd v. PPES Oil & Gas Sdn Bhd & Ors [1998] 3 CLJ 275 ***(foll)***

Soilchem Sdn Bhd v. Standard-Elektrik Lorenz AG [1993] 3 MLJ 68 ***(foll)***

Syarikat Yean Tat (M) Sdn Bhd v. Ahli Bina Pamong Sari Sdn Bhd [1995] 3 CLJ 827 ***(refd)***

Tansa Enterprise Sdn Bhd v. Temenang Engineering Sdn Bhd [1994] 2 MLJ 353 ***(refd)***

The 'Niedersachsen'; Ninemia Maritime Corporation v. Trave Schiffahrtsgessellschaft GmbH & Co KG [1984] 1 All ER 398 ***(refd)***

Third Chandris Shipping Corporation & Ors. v. Unimarine SA [1979] 2 All ER 972 ***(refd)***

Zainal Abidin Hj Abdul Rahman v. Century Hotel Sdn Bhd [1982] 1 MLJ 260 ***(foll)***

Legislation referred to:

Arbitration Act 1952, ss. 13(6)(h), 25(2), 34(1), (2)
Courts of Judicature Act 1964, s. 25
Rules of the High Court 1980, O. 92 r. 4
Rules of the Regional Centre for Arbitration at Kuala Lumpur, art. 26(3)

Other source(s) referred to:

Malaysian High Court Practice, 1998 Desk edn 1, p 1328

For the plaintiff - Azad Bashir Abdul Kariem Bashir; M/s Bashir & Asha
For the defendant - CW Lim (Audrey Chew); M/s Skrine

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Application

This is the plaintiff's application in encl. (2) by way of originating summons for, *inter alia*, an order that:

(a) The defendant, whether by itself, its directors, servants or agents or otherwise be restrained and a Mareva injunction be granted to restrain the defendant, etc. until one month after the conclusion of the determination in the current arbitration proceedings 1 and 2 before the Kuala Lumpur Regional Centre for Arbitration ("KLRCA") between the plaintiff and the defendant ("the aforesaid arbitration proceedings") or until further order, from dealing with, dispose of or remove from the jurisdiction any asset within the jurisdiction generally including Lot No. 805, 806 and 813 (now known as PT 213 to PT 226; HS(D) 30264 to HS(D) 30277) ("the assets")

Mukim Padang Temu, District of Melaka Tengah except assets, within the jurisdiction in which the value free from encumbrances, in excess of RM6,485,529.50;

(b) The defendant within seven days from the date of service of this order make and file in this court and serve on the plaintiff's solicitors an affidavit stating in detail in respect of the assets within jurisdiction, together with address, and whether the said assets are in its own name and if not, why and in whose name it was held.

As will be seen later in this judgment, submissions by the respective learned counsel are primarily and closely focused on prayer (1) above and prayer (2) seems to depend largely on the success or failure of prayer (1).

Submission For Plaintiff

Encik Azad Bashir bin Abdul Kariem Bashir, learned counsel for the plaintiff, submitted that although the aforesaid arbitration proceedings are governed by the Kuala Lumpur Regional Centre for Arbitration Rules ("KLRCA Rules"), our High Court has jurisdiction to grant the Mareva injunction sought by the plaintiff. He relied on art. 26(3) of the KLRCA Rules. In his further submission, he conceded that he is not relying on the provisions of s. 13(6)(h) of the Arbitration Act 1952 ("AA 1952") in view of the ouster provision in s. 34 thereof.

In respect of the merits in the plaintiff's application herein, he contended that in the aforesaid arbitration proceedings, statement of claim, statement of defence and written submissions have been filed and the plaintiff has proved a good arguable case for additional works done under the stipulated, final and other claims.

He added that the defendant did not dispute that the defendant has assets within jurisdiction.

In respect of the dissipation of assets, the plaintiff relied on a STAR newspaper report about Olympia Holdings Bhd ie, the defendant's holding company. The plantiff averred that the plaintiff would not be able to realise any judgment to be obtained subsequently against the defendant. The assets had been charged to Sime Bank (now RHB Bank) on 3 December 1997 for a loan to be given to a third party company ie, Mascon Sdn Bhd. The court was informed that despite plaintiff's request, the defendant has failed to produce documents and resolutions in order to prove that the charge was properly done. This, in the view of plaintiff's learned counsel, shows that there is a real risk of dissipation of the defendant's assets in order to frustrate the eventual judgment in the aforesaid arbitration proceedings.

Defendant's Contention

Encik CW Lim, assisted by Cik Audrey Chew, both learned counsel for the defendant, submitted that there are two issues for determination by the court *viz.*:

(a) the jurisdictional basis of the plaintiff's application; and

(b) whether the plaintiff has successfully demonstrated its entitlement to a Mareva injunction.

In respect of jurisdiction, it was contended for the defendant that s. 13(6)(h) AA 1952 read with s. 25 of the Courts of Judicature Act 1964 ("CJA 1964") confers jurisdiction on the High Court to grant interim injunction in respect of existing court proceedings and not in respect of arbitration proceedings which have been excluded by s. 34(1) of the AA 1952, as in this case where the KLRCA Rules apply. It was also argued for the defendant that the plaintiff's application is fatally flawed for want of jurisdiction and although the aforesaid arbitration proceedings are between local or domestic parties, no distinction should be drawn between local and international parties. The defendants added that the plaintiff seeking a Mareva injunction is proposing to vary the arbitration agreement between the parties so as to confer jurisdiction on the court.

On the merits in the plaintiff's application herein, it was submitted for the defendant that the burden is on the plaintiff to prove that it has a good arguable case, and that in this respect there is a concern that the High Court may usurp the powers of the respective arbitrators in determining the matters in the aforesaid arbitration proceedings.

On the issue of a real risk of dissipation of assets, the defendant's response is that the defendant intends to develop the land and so the defendant is not likely to dispose of the land. It was said for the defendant that the registered charge was created in favour of Mascon Sdn Bhd, the defendant's related company, and credit facility has been granted to and enjoyed by Pengurusan Danaharta Nasional Bhd ("Danaharta"), to whom the defendant owes RM36 million. It was also contended that a delay in paying a debt does not amount to dissipation of assets.

An issue of balance of convenience was raised for the defendant in that Danaharta is at liberty to pursue its rights under the charge and a Mareva injunction would add very little to secure the claim against the defendant, in which case, the balance of convenience is not in favour of granting the Mareva injunction.

Decision Of The Court

Jurisdiction

The first ever authoritative judicial pronouncement in Malaysia that our High Court under para. 6 of the Schedule to the CJA 1964 has jurisdiction to grant a Mareva injunction (which derived its name from the case of *Mareva Compania*, *infra*) is to be found in the clear, concise and comprehensive judgment of Raja Azlan Shah, CJ (Malaya) (now HRH Sultan of Perak), in *Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn. Bhd.* [1982] 1 MLJ 260. The judgment traced the origin of the jurisdiction exercised by the English courts, in the following passage:

> It is established that the English court's jurisdiction to grant a Mareva injunction was based on the old procedure of 'foreign attachment' where it was used to compel the defendant to appear and give bail to attend. If he were outside the jurisdiction, the plaintiff was entitled instantly, after issuing the writ, to attach the defendant's assets within jurisdiction. The interlocutory injunction is the modern version of the old established procedure. The courts invoked section 25(8) of the Supreme Court of Judicature Act, 1973 when granting the injunction. The subsection reads:
>
> > A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory Order of the court in all cases in which it shall appear to the court to be just or convenient ...
>
> That subsection was repeated in nearly the same words in section 45 of the Supreme Court of Judicature (Consolidation) Act 1925. It reads:
>
> > (1) The High court may grant a *mandamus* or an injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do ...
>
> This section enables the court a wider discretion to grant an interlocutory injunction wherever it appears to the court to be just or convenient. The Mareva injunction is now given statutorty force by section 37(2) of the Supreme Court Act, 1981.
>
> This discretion exercised by the courts is not fettered by rigid rules. The first two cases on Mareva injunction *viz., Nippon Yusen Kaisha v. Karageorgis & Anor*. [1975] 1 WLR 1093 and the *Mareva Compania Naviera S.A. v. International Bulk Carriers S.A.* [1974] 2 Llyods Report 509 itself are part of the evolutionary process enabling the law to deal with the commercial realities of modern business. It is illustrative of a statutory provision conferring judicial discretion to do what is just and convenient being applied in a way which keeps them in line with contemporary changing social attitudes.

Paragraph 6 of the Schedule to the Courts of Judicature Act, 1964, would appear to be the equipollent provision to section 45 of the English Supreme Court of Judicature (Consolidation) Act, 1925 and reads:

> 6. Power to provide for the interim preservation of property the subject-matter or any cause or matter by sale or by injunction or the appointment of a receiver or the registration of a caveat or a *lis pendens* or in any other manner whatsoever.

See also *Regent Decorators (M) Sdn. Bhd. & Anor. v. Michael Chee & Ors.* [1984] 2 CLJ 296; [1984] 2 CLJ (Rep) 441, *Aspatra Sdn. Bhd. & 21 Ors. v. Bank Bumiputra Malaysia Bhd. & Anor.* [1987] 2 CLJ 377; [1987] CLJ (Rep) 50.

In addition, the court is also empowered by its inherent jurisdiction to grant a Mareva injunction: RHC 1980 O. 92 r. 4; *Pacific Centre Sdn. Bhd. v. United Engineers Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319. (*Malaysian High Court Practice*, 1998 Desk Edition 1 MLJ p. 1328)

The next point for consideration is whether our High Court has jurisdiction to grant a Mareva injunction for the purpose of restraining the disposal of assets which are the subject matters of the aforesaid arbitration proceedings.

In respect of arbitration proceedings which are not held under the KLRCA Rules, the legislative basis conferring jurisdiction on our High Court to make an order in respect of an interim injunction is to be found in s. 13(6)(h) of the AA 1952 which merits reproduction as follows:

> (6) The High Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of:
>
> (h) interim injunctions, ... as it has for the purpose of and in relation to an action or matter in the High Court:

However, the aforesaid arbitration proceedings are proceedings held under the KLRCA Rules and are in my view outside the scope and ambit of the AA 1952 by virtue of s. 34(1) which where relevant reads as follows:

> **34. Act not to apply to certain arbitrations.**
>
> (1) Notwithstanding anything to the contrary in this Act or in any other written law but subject to subsection (2) in so far as it relates to the enforcement of an award, the provisions of this Act or any other written law shall not apply to any arbitration held under ... the Rules of the Regional Centre for Arbitration at Kuala Lumpur.

I shall now consider the ambit of s. 34(1) by reference to the decisions of our courts.

In *Syarikat Yean Tat (M) Sdn Bhd v. Ahli Bina Pamong Sari Sdn Bhd* [1995] 3 CLJ 827, Abdul Wahab Patail, JC (now J) held, *inter alia*, that a reference in that case to s. 34 of the AA 1952 was incorrect as the arbitiation was not an international one but an arbitration involving two local parties, who had agreed to engage an arbitrator from the KLRCA, but that did not transform the nature of the arbitration into an international one; it still remained as an arbitration based on the agreement by local parties. The tenor of the judgment is that s. 34 of the AA 1952 cannot be invoked if both the parties to an arbitration are local parties.

Be that as it may, in the submissions before me in the instant case, the specific subsection that is called into question is s. 34(1) of the AA 1952 which is to the effect that except for the enforcement of an award, to which s. 34(2) of the AA 1952 would apply, the provisions of the AA 1952 or any other written law shall not apply to any arbitration held, eg, under the KLRCA Rules. In my view, the word "any" is sufficiently wide and general to cover all and sundry and so long as an arbitration is held eg, under the KLRCA Rules, be it between exclusively local parties, local and international parties or exclusively international parties, s. 34(1) is to be invoked to take the arbitration outside the jurisdiction of our courts. It follows that the test for the ouster of our court's jurisdiction under s. 34(1) is any arbitration held under the KLRCA Rules and there is no distinction made in respect of local or international parties.

In *Klockner Industries-Anlagen GmbH v. Kien Tat Sdn Bhd & Anor* [1990] 3 MLJ 183, Zakaria Yatim, J (later FCJ) held that s. 34 of the Act precluded the High Court from exercising its supervisory jurisdiction over arbitration proceedings at the KLRCA. At p. 185, his Lordship said:

> In my opinion the crucial words in s. 34 are '... the provisions of this Act and other written law shall not apply to any arbitration held under ... the Rules of the Regional Centre for Arbitration at Kuala Lumpur'. It is clear that under the section, the court cannot exercise its supervisory function as provided in the Arbitration Act 1952, in respect of such arbitration. Neither can the court exercise its supervisory function over such arbitration under any other written law. The words 'written law' has been defined in s. 3 of the Interpretation Act 1967, to mean the Federal Constitution and State Constitutions, Acts of Parliament and subsidiary legislation made thereunder; ordinances and enactments and subsidiary legislation made thereunder; and any other legislative enactments or legislative instruments.

> ... the words in s. 34 are 'plain, clear and precise'. Reading the clear language of the section I am of the view that the section excludes the court from exercising its supervisory function under the Arbitration Act 1952 or under any other written law, including the Companies Act 1965, in respect of arbitrations held under the Rules of the Arbitration Centre.

In this connection, I would add that para. 6 of the Schedule to the CJA 1964 is part and parcel of the written law which has no application in the instant use.

Klockner, supra, was applied in *Soilchem Sdn Bhd v. Standard-Elektrik Lorenz AG* [1993] 3 MLJ 68 where Abu Mansor, J (later FCJ) said that the policy of the AA 1952 was obviously to exclude cases that are before the KLRCA and that s. 34(1) was meant to exclude the jurisdiction of this court.

Both *Klockner* and *Soilchem, supra,* were confirmed by the Court of Appeal in *Sarawak Shell Bhd v. PPES Oil & Gas Sdn Bhd & Ors* [1998] 3 CLJ 275, which categorically said that the court also had no other power to intermeddle in the arbitrations at the KLRCA whether by way of inherent jurisdiction or at common law or otherwise. There, *Sarawak Shell* sought to stymie the arbitration proceedings commenced by the respondents by contending simply that s. 34(1) did not deprive the High Court of its power to make orders under s. 25(2) of the AA 1952, but the learned trial judge rejected this attempt by holding that s. 34(1) made any reference to s. 25(2) impermissible. This was affirmed by the Court of Appeal through the judgment of Shankar, JCA, holding that the entire Act (except the enforcement provision in s. 34(2)) has been excluded as well as all other statutory provisions and that such a construction is consistent with reality of the situation because the KLRCA Rules constitute a comprehensive framework for the resolution of all disputes within their ambit. The Court of Appeal added that the effect of s. 34(1) (which has no equivalent provision in the United Kingdom or elsewhere) was to exclude the AA 1952 and all other written law from arbitrations held under the KLRCA Rules.

Article 26(3) of the KLRCA Rules on which the plaintiff now relies reads as follows:

> A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or as a waiver of that agreement.

It was argued for the plaintiff that the judicial authority under art. 26(3), *supra,* is the High Court of Malaya, which has jurisdiction to grant a Mareva injunction in respect of arbitration proceedings held under the KLRCA Rules.

After considering the aforesaid submission, I am of the view that art. 26(3) does not confer any jurisdiction on our High Court nor can it be construed to supersede the clear, plain and precise provisions of s. 34(1) of the AA 1952 *supra.* Article 26(3) is only part and parcel of the KLRCA Rules and does not form part of our law and is only of restricted application ie, in arbitration proceedings before the KLRCA and nowhere else.

In the light of the grounds and the aforesaid authorities, I hold that the aforesaid arbitration proceedings come within the ambit of s. 34(1) of the AA 1952, so that the AA 1952 and the CJA 1964 and for that matter all our written law can have no application. That being the case, the plaintiff's application in encl. (2) is devoid of any jurisdictional basis and is therefore dismissed *in limine* with costs.

Merits Of Plaintiff's Application

In the event that I have occasioned an error in my conclusion in 1 above, *ex abundante cautela* I shall now proceed to consider the merits of the plaintiff's application in encl. (2), on the assumption that our High Court has jurisdiction under art. 26(3) of the KLRCA Rules.

It is trite law that in any application for a Mareva injunction, it is incumbent on the applicant ie, the plaintiff herein to establish the following essential elements:

(1) There must be a strong *prima facie* case against the defendant: *Nipoon Yusen Kaisha v. Karageorgis* [1975] 1 WLR 1093; *Mareva Compania Naviera SA v. International Bulkcarriers SA* [1975] 2 Lloyds Rep 509; *Rasu Maritima SA v. Perusahaan Pertimbangan Minyak Dan Gas Bumi Negara (Government of the Republic of Indonesia Intervening)* [1978] QB 644; *The 'Niedersachsen'; Ninemia Maritime Corporation v. Trave Schiffahrtsgessellschaft GmbH & Co KG* [1984] 1 All ER 398; *Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd., supra; S & F International Ltd v. Trans-Con Engineering Sdn Bhd* [1985] 2 CLJ 228; [1985] CLJ (Rep) 280; *Ace King Pte Ltd v. Circus Americano Ltd* [1985] 2 MLJ 75; *Bank Bumiputra Malaysia Bhd v. Lorrain Osman* [1985] 2 MLJ 236; *Creative Furnishing Sdn Bhd v. Wong Koi* [1989] 2 MLJ 153; *Tansa Enterprise Sdn Bhd v. Temenang Engineering Sdn Bhd* [1994] 2 MLJ 353; *Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn. Bhd., supra.*

(2) There must be clear evidence that the defendant has assets within jurisdiction: *Third Chandris Shipping Corporation & Ors. v. Unimarine SA* [1979] 2 All ER 972; *Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Bhd., supra; Ace King Pte Ltd v. Circus Americano Ltd, supra; Bank Bumiputra Malaysia Bhd v. Lorrain Osman, supra.*

(3) There must a danger that the defendant's assets may be dissipated before judgment: *Mareva Compania Naviera SA v. International Bulkcarriers SA, supra; Third Chandris Shipping Corporation & Ors v. Unimarine SA, supra; The 'Niedersachsen'; Ninemia Maritime Corporation v. Trave Schiffahrtsgessellschaft GmbH & Co KG, supra; Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd, supra; Bank Bumiputra Malaysia Bhd v. Lorrain Osman, supra; S & F International Ltd v. Trans-Con Engineering Sdn Bhd, supra; Creative Furnishing Sdn Bhd v. Wong Koi, supra.* (See *Malaysian High Court Practice*, 1998 Desk Edn 1 MLJ p. 1328).

Each and every essential element merits consideration now.

(a) Strong *Prima Facie* Case

The common ground here is that in the aforesaid arbitration proceedings, one has reached its final stages of submission while the other has not got off the ground. Since the burden is on the plaintiff to prove this essential element, the plaintiff is required to produce all the materials in the aforesaid arbitration proceedings in order to assist the court in arriving at this conclusion.

In this connection, it is necessary to consider s. 13(6)(h) of the AA 1952. In *Rimbunan Hijau Sdn. Bhd. v. Sarawak Plywood (M) Sdn. Bhd.* [1985] 1 CLJ 424; ([1985] CLJ (Rep) 275) SC, disputes arose between the parties and the appellant applied to the court for the appointment of an arbitrator to deal with the disputes between the parties. The learned trial judge made an order for the appointment of an arbitrator but dismissed the application of the appellants for an interlocutory injunction to restrain the respondents from doing certain acts specified pending arbitration. The refusal to grant the injunction was upheld by the Supreme Court through the judgment of Syed Agil Barakbah, SCJ (as he then was) which carried at p. 428 (at p. 278) the following passage:

> An injunction is a form of judicial relief whereby the court orders a party to the proceedings either to refrain from doing specified acts or to do certain specified acts. An interocutory injunction may be granted if it appears to the court to be just or convenient so to do in order to safeguard the position of one of the parties until his rights can finally be determined at the trial of the action. Section 13(6)(h) of the Arbitration Act 1952 (hereinafter referred to as "the Act") empowers the High Court to grant an interim injunction or to appoint a Receiver in a proper case and it was under this statutory provision of the Act that the appellants were asking the learned Judge to exercise his jurisdiction, pending the determination of the disputes of the parties by arbitration. Since the appointment of an arbitrator had been made, we are of the opinion that in the exercise of his discretionary statutory power under section 13(6)(h) of the Act the main consideration of the Court is whether or

> not the *status quo* ought to be preserved. In such a case like the present, the principles enunciated by Lord Diplock in *American Cyanamid* case does not apply to such an application. We do not think that Lord Diplock had this sort of application in mind when he stated his principles in such wide terms.

This decision was applied by Kamalanathan Ratnam, J in *Arab Malaysian Corp Builders Sdn Bhd & Anor v. ASM Development Sdn Bhd* [1998] 2 CLJ Supp 169, holding that the principles applicable under s. 13(6)(h) of the AA 1952 are much narrower.

In my view, the issue as to whether or not the plaintiff has a strong *prima facie* case is to be determined by the respective arbitrators in the aforesaid arbitration proceedings and I should not pre-determine this issue. The determination of this issue definitely has a direct bearing in the award which is to be handed down by the respective arbitrators and the respective arbitrators should exercise their independence in arriving at their respective findings on this issue by reference to the materials and documents before them, unfettered and untrammelled by any pre-determination by me in the instant case.

This appears to be the same approach adopted and applied by the Supreme Court in *Rimbunan Hijau, supra* and *Arab Malaysian Corp, supra.* In this connection, there has been no evidence pertaining to the finding by the respective arbitrators in respect of this essential element ie, a strong *prima facie* case.

(b) Assets Within Jurisdiction

It is common ground that the two pieces of land in question belonging to the defendant ("the assets") are within jurisdiction and I need not go further than this.

(c) Dissipation Of Assets

It is not disputed that the assets are to be developed by the defendant and are subject to a third party charge in favour of Mascon Sdn Bhd which is the defendant's related company, for a loan and the defendant has been acquired by Danaharta, under the Pengurusan Danaharta Nasional Berhad Act 1998 (Act 587).

The amount outstanding ie, RM36 million owing to Danaharta far exceeds the amount of RM6.5 million claimed by the plaintiff in the aforesaid arbitration proceedings.

The burden is on the plaintiff to establish by way of evidence of any conduct on the part of the defendant to suggest that there is a risk of dissipation of the assets: *Choy Chee Keen Collin v. Public Utilities Board* [1997] 1 SLR 604. There is no such evidence in the case before me.

Further, the remedy of a Mareva injunction is not of unlimited jurisdiction: per Mohd Azmi, SCJ (as he then was) in *Creative Furnishing Sdn Bhd v. Wong Koi, supra*, who added eg, that a mere refusal to pay a disputed debt fell far short of the necessary evidence to establish real risk of dissipation of assets.

As a matter of fact, the assets have been locked and interlocked by way of charges as security for the aforesaid loans which the chargees and ultimately Danaharta, may enforce pursuant to the changes and order in accordance with Act 587.

Conclusion

On the foregoing grounds, I hold that the plaintiff has not established the essential elements of a strong *prima facie* case and the real risk of dissipation of assets from jurisdiction and so I hereby dismiss the plaintiff's application in encl. (2) with costs.